

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 16-1093V

Filed: August 19, 2019

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ALVIS SUTTON,

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UNPUBLISHED

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Petitioner,

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v.

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Attorneys' Fees and Costs

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SECRETARY OF HEALTH
AND HUMAN SERVICES,

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Respondent.

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Amber Wilson, Esq., Maglio Christopher and Toale, PA, Washington, DC, for petitioner.

Colleen Hartley, Esq., United States Department of Justice, Washington, DC, for respondent.

DECISION ON ATTORNEYS' FEES AND COSTS¹

Roth, Special Master:

On September 1, 2016, Alvis Sutton ("Mr. Sutton" or "petitioner") filed a petition pursuant to the National Vaccine Injury Compensation Program.² Petitioner alleged that he developed polymyalgia rheumatica ("PMR") after receiving an influenza vaccine on or about September 30, 2014. Stipulation, filed Mar. 11, 2019 at ¶¶ 1-4, ECF No. 41. On March 11, 2019, the parties filed a stipulation, which the undersigned adopted as her Decision awarding damages on the same day. ECF No. 41.

On May 1, 2019, petitioner filed an application for attorneys' fees and costs. ECF No. 46 ("Fees App."). Petitioner requests total attorneys' fees and costs in the amount of \$45,206.29

¹ The undersigned intends to post this Ruling on the United States Court of Federal Claims' website. **This means the ruling will be available to anyone with access to the Internet.** In accordance with Vaccine Rule 18(b), petitioner has 14 days to identify and move to redact medical or other information, the disclosure of which would constitute an unwarranted invasion of privacy. If, upon review, the undersigned agrees that the identified material fits within this definition, the undersigned will redact such material from public access. Because this unpublished ruling contains a reasoned explanation for the action in this case, the undersigned is required to post it on the United States Court of Federal Claims' website in accordance with the E-Government Act of 2002. 44 U.S.C. § 3501 note (2012) (Federal Management and Promotion of Electronic Government Services).

² National Childhood Vaccine Injury Act of 1986, Pub L. No. 99-660, 100 Stat. 3755.

(representing \$30,509.10 in attorneys' fees and \$14,697.19 in costs). Fees App. at 1. Pursuant to General Order No. 9, petitioner warrants that she has not incurred any costs in pursuit of this litigation. Fees App. Ex. 44. Respondent responded to the motion on May 1, 2019, stating "Respondent is satisfied the statutory requirements for an award of attorneys' fees and costs are met in this case" and requesting that the undersigned "exercise her discretion and determine a reasonable award for attorneys' fees and costs." Response at 2-3, ECF No. 47. Petitioner filed a reply. Reply, ECF No. 48.

This matter is now ripe for consideration.

I. Legal Framework

The Vaccine Act permits an award of "reasonable attorneys' fees" and "other costs." § 15(e)(1). If a petitioner succeeds on the merits of his or her claim, the award of attorneys' fees is automatic. *Id.*; see *Sebelius v. Cloer*, 133 S. Ct. 1886, 1891 (2013). However, a petitioner need not prevail on entitlement to receive a fee award as long as the petition was brought in "good faith" and there was a "reasonable basis" for the claim to proceed. § 15(e)(1). Here, because petitioner was awarded compensation, she is entitled to a reasonable award of attorneys' fees and costs.

The Federal Circuit has endorsed the use of the lodestar approach to determine what constitutes "reasonable attorneys' fees" and "other costs" under the Vaccine Act. *Avera v. Sec'y of Health & Human Servs.*, 515 F.3d 1343, 1349 (Fed. Cir. 2008). Under this approach, "an initial estimate of a reasonable attorneys' fees" is calculated by "multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate." *Id.* at 1347–48 (quoting *Blum v. Stenson*, 465 U.S. 886, 888 (1984)). That product is then adjusted upward or downward based on other specific findings. *Id.*

Special masters have substantial discretion in awarding fees and may adjust a fee request *sua sponte*, apart from objections raised by respondent and without providing petitioners with notice and opportunity to respond. See *Sabella v. Sec'y of Health & Human Servs.*, 86 Fed. Cl. 201, 209 (2009). Special masters need not engage in a line-by-line analysis of petitioner's fee application when reducing fees. See *Broekelschen v. Sec'y of Health & Human Servs.*, 102 Fed. Cl. 719, 729 (2011).

II. Discussion

A. Reasonable Hourly Rate

A "reasonable hourly rate" is defined as the rate "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Avera*, 515 F.3d at 1348 (quoting *Blum*, 465 U.S. at 896 n.11). In general, this rate is based on "the forum rate for the District of Columbia" rather than "the rate in the geographic area of the practice of petitioner's attorney." *Rodriguez v. Sec'y of Health & Human Servs.*, 632 F.3d 1381, 1384 (Fed. Cir. 2011) (citing *Avera*, 515 F. 3d at 1349). There is a "limited exception" that provides for attorney's fees to be awarded at local hourly rates when "the bulk of the attorney's work is done outside the forum jurisdiction" and "there is a very significant difference" between the local hourly rate and forum

hourly rate. *Id.* This is known as the *Davis County* exception. *See Hall v. Sec'y of Health & Human Servs.*, 640 F.3d 1351, 1353 (2011) (citing *Davis Cty. Solid Waste Mgmt. & Energy Recovery Special Serv. Dist. v. U.S. EPA*, 169 F.3d 755, 758 (D.C. Cir. 1999)).

For cases in which forum rates apply, *McCulloch* provides the framework for determining the appropriate hourly rate range for attorneys' fees based upon the attorneys' experience. *See McCulloch v. Sec'y of Health & Human Servs.*, No. 09–293V, 2015 WL 5634323 (Fed. Cl. Spec. Mstr. Sept. 1, 2015). The Office of Special Masters has accepted the decision in *McCulloch* and has issued a Fee Schedule for subsequent years.³

Petitioner requests the following hourly rates for the work of his counsel: for Ms. Amber Wilson, \$275.00 per hour for work performed in 2016, \$290.00 per hour for work performed in 2017, \$308.00 per hour for work performed in 2018, and \$323.00 per hour for work performed in 2019; for Ms. Anne Toale, \$367.00 per hour for work performed in 2016, \$378.00 for work performed in 2017, and \$402.00 per hour for work performed in 2018; and for Mr. F.J. Caldwell, \$356.00 for work performed in 2016. The rates requested herein have previously been found to be reasonable. *See Waldorf v. Sec'y of Health & Human Servs.*, No. 17-758V, 2019 WL 1796137, at *2 (Fed. Cl. Spec. Mstr. Mar. 6, 2019); *Douglass v. Sec'y of Health & Human Servs.*, No. 17-175V, 2019 WL 3239466, at *1 (Fed. Cl. Spec. Mstr. June 26, 2019). Accordingly, no adjustment to the requested rates is necessary.

Petitioner requests the following paralegal hourly rates: \$135.00 per hour for work performed in 2016, \$145.00 per hour for work performed in 2017, \$148.00 per hour for work performed in 2018, and \$154.00 per hour for work performed in 2019. The rates requested herein have previously been found to be reasonable. *See Waldorf*, 2019 WL 1796137, at *2; *Douglass*, 2019 WL 3239466, at *1. Accordingly, no adjustment to the requested rates is necessary.

B. Hours Reasonably Expended

Attorneys' fees are awarded for the “number of hours reasonably expended on the litigation.” *Avera*, 515 F.3d at 1348. Counsel should not include in their fee requests hours that are “excessive, redundant, or otherwise unnecessary.” *Saxton ex rel. Saxton v. Sec'y of Health & Human Servs.*, 3 F.3d 1517, 1521 (Fed. Cir. 1993) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983)). “Unreasonably duplicative or excessive billing” includes “an attorney billing for a single task on multiple occasions, multiple attorneys billing for a single task, attorneys billing excessively for intra office communications, attorneys billing excessive hours, [and] attorneys entering erroneous billing entries.” *Raymo v. Sec'y of Health & Human Servs.*, 129 Fed. Cl. 691, 703 (2016). While attorneys may be compensated for non-attorney-level work, the rate must be comparable to what would be paid for a paralegal or secretary. *See O'Neill v. Sec'y of Health & Human Servs.*, No. 08–243V, 2015 WL 2399211, at *9 (Fed. Cl. Spec. Mstr. Apr. 28, 2015). Clerical and secretarial tasks should not be billed at all, regardless of who performs them. *See, e.g.,*

³ OSM Attorneys' Hourly Rate Fee Schedules can be accessed at:

<http://www.cofc.uscourts.gov/node/2914>

The hourly rates contained within the schedules are updated from the decision in *McCulloch v. Sec'y of Health & Human Servs.*, No. 09-293V, 2015 WL 5634323 (Fed. Cl. Spec. Mstr. Sept. 1, 2015).

McCulloch, 2015 WL 5634323, at *26. Hours spent traveling are ordinarily compensated at one-half of the normal hourly attorney rate. *See Scott v. Sec'y of Health & Human Servs.*, No. 08–756V, 2014 WL 2885684, at *3 (Fed. Cl. Spec. Mstr. June 5, 2014) (collecting cases). And “it is inappropriate for counsel to bill time for educating themselves about basic aspects of the Vaccine Program.” *Matthews v. Sec'y of Health & Human Servs.*, No. 14–1111V, 2016 WL 2853910, at *2 (Fed. Cl. Spec. Mstr. Apr. 18, 2016). Ultimately, it is “well within the Special Master's discretion to reduce the hours to a number that, in [her] experience and judgment, [is] reasonable for the work done.” *Saxton*, 3 F.3d at 1522. In exercising that discretion, special masters may reduce the number of hours submitted by a percentage of the amount charged. *See Broekelschen*, 102 Fed. Cl. at 728–29 (affirming the Special Master's reduction of attorney and paralegal hours); *Guy v. Sec'y of Health & Human Servs.*, 38 Fed. Cl. 403, 406 (1997) (same).

Upon review, the undersigned finds the overall hours billed (121.4) to be largely reasonable. The only reduction necessary is for time billed by paralegals for downloading filings to “update file.” *See generally* Fees App. Ex. 42 (illustrative entries on 9/20/16, 10/6/16, 11/29/16, 1/26/17, 5/1/17, 4/13/18). Beyond the fact that downloading a document and saving it in a folder does not take 6 minutes, the billing records indicate that Ms. Wilson also billed for review of all filings, meaning that even routine filings such as review of the Court's order reassigning the case to a different special master had 12 minutes of time billed for its handling. Accordingly, the undersigned will reduce the final award of fees by **\$389.60** to account for these entries. Petitioner is therefore entitled to final attorneys' fees of **\$30,119.50**.

C. Reasonable Costs

Like attorneys' fees, a request for reimbursement of attorneys' costs must be reasonable. *Perreira v. Sec'y of Health & Human Servs.*, 27 Fed. Cl. 29, 34 (Fed. Cl. 1992). Petitioner requests a total of \$14,697.19 in costs. Fees App. Ex. 43 at 2. This amount is comprised of acquiring medical records, expert witness fees, and travel expenses. All of these costs are reasonable in the undersigned's experience and petitioner has provided adequate documentation supporting all costs. Petitioner shall therefore be reimbursed in full for attorneys' costs.

III. Conclusion

In accordance with the foregoing, petitioner's motion for attorneys' fees and costs is **GRANTED**. I find that petitioner is entitled to an award of attorneys' fees and costs as follows:

- 1) **\$44,816.69, representing reimbursement for petitioner's attorneys' fees and costs, in the form of a check payable jointly to petitioner and Ms. Amber Wilson, Esq.**

In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court shall enter judgment in accordance herewith.⁴

⁴ Entry of judgment can be expedited by each party's filing of a notice renouncing the right to seek review. Vaccine Rule 11(a).

IT IS SO ORDERED.

s/Mindy Michaels Roth

Mindy Michaels Roth
Special Master